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Oliver Tim Axmann v Celcom (M) Bhd & Anor and other appeals (No 1)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)-2067 OF 2010, W-02(IM)-2068 OF 2010, W-02(IM)-2069 OF 2010, W-02(IM)-2070 OF 2010, W-02(IM)-2082 OF 2010, W-02(IM)-3121 OF 2010, W-02(IM)-3123 OF 2010 AND W-02(IM)-3125 OF 2010

ABU SAMAH, AZAHAR MOHAMED AND AZIAH ALI JJCA

11 MARCH 2014

Civil Procedure — Setting aside — Application for — Application to set aside two civil suits that arose in relation to arbitration award — Whether subject matter, issues and relief claimed in both suits were different from those raised before arbitration court — Whether appellants were parties to arbitration proceedings — Whether civil suits were abuse of process of court — Service — Out of jurisdiction — Whether there was arguable case for leave to serve out of jurisdiction — Whether proven that there was genuine case to be tried

The present judgment was in respect of two sets of appeals, which arose from two civil suits in the KL High Court. The plaintiffs in both these civil suits were at all material times Celcom Malaysia Bhd ('Celcom') and Technology Resources Industries Bhd ('TRI'). Celcom was a wholly owned subsidiary of TRI but pursuant to a debt and corporate restructuring exercise in 10 October 2002, TRI became the wholly owned subsidiary of Celcom with the latter listed on the KLSE. The appellants in both sets of appeals were at all material times the directors of Celcom and/or TRI. Sometime in 1996, Deutsche Telekom AG ('DTAG') through its wholly owned subsidiary Deteasia Holding GmbH ('DTAH') entered into various agreements with Celcom and TRI. These agreements included inter alia 'veto rights' that required both Celcom and TRI to obtain DTAH's written consent if they intended to issue or allot more than 5% of its shares to another telecommunications company or acquire shares in or merge with another telecommunications company; and a 'buy-out provision', which provided that in the absence of such consent from DTAH, Celcom was obliged to obtain a third party to offer to purchase its shares at a prescribed formula. Subsequently Celcom entered into an agreement with Telekom Malaysia Bhd to acquire the whole of the issued and paid up share capital of TM Cellular (M) Sdn Bhd without DTAH's consent. DTAH commenced arbitration proceedings against Celcom. The International Court of Arbitration (ICC) found Celcom liable to DTAH for breach of the veto rights and the buy-out provision and awarded DTAH damages with interest and costs. Consequently Celcom and TRI commenced the two civil suits against the final arbitration award of the ICC, which the appellants sought to

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set aside on the grounds that the subject matter, issues and the facts in both the suits had been raised and argued by the first plaintiff in the ICC Arbitration between Celcom and DTAH. The appellants submitted that leave to issue out of jurisdiction should not have been granted under O 11 r 4 of the Rules of the High Court 1980 ('RHC') and contended that the two civil suits constituted an abuse of the process of court because they were collateral attacks on the final award.

Held, dismissing the appeals with costs in the sum of RM50,000:

(1) The subject matter and relief claimed in the two civil suits was different from that of the ICC arbitration. In the first of the two civil suits (610 Suit) the claim by Celcom and TRI was based on the breaches committed by the appellants as directors of Celcom and TRI. In the 610 suit, Celcom and TRI sought to recover profits made by the various directors as a result of the breaches of their fiduciary duties and the losses suffered by Celcom and TRI as a result of these breaches. In relation to the second civil suit (the 1960 suit), Celcom and TRI averred that the appellants wrongfully and by unlawful means conspired to injure or cause loss to both Celcom and TRI. As such, in effect, the final award by the ICC neither addressed the conduct of the appellants as directors of the Celcom and TRI, their roles played in any of the steps leading to the making of the agreements with DTAH nor make any findings vis-a-vis the appellants on the issues raised in both the suits (see paras 18–20, 24 & 27).

(2) Further, the appellants were not parties to the ICC proceedings. It is trite law that that an arbitration award had no effect on persons who were not parties to the same and could not be relied on as evidence of the facts found for the purposes of subsequent proceedings. In addition, the appellants could not be considered as privies to the ICC arbitration as there is no privity of interest between a company and its directors (see paras 25–26).

(3) It is settled law that an applicant seeking leave to serve out of jurisdiction need only show that there was an arguable case that the matter fell within one of the limbs of O 11 r 1(1) of the RHC and that in respect of the merits of the claim there was a serious issue to be tried. In the present case, the trial judge was correct in finding that the claim in the 610 suit could have fallen within the ambit of O 11 r 1(h) and (j) of the RHC. In respect of the merits of the claim, from the pleadings it was clear that both the proceedings related to actions by Celcom and TRI for breaches of fiduciary duties as directors of both companies. From the pleadings and the affidavits there were serious issues to be tried in both the suits which ought to be dealt with in a full trial and which could not be summarily dealt with. Hence, Celcom and TRI had satisfied the requirements under O 11 r 4 of the RHC in that the procedural requirements had been

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satisfied and it had also been shown that the case against the respective appellants in both the suits was a genuine one (see paras 21–22).

[Bahasa Malaysia summary

Penghakiman ini adalah berkenaan dengan dua set rayuan, yang mana timbul daripada dua guaman sivil di Mahkamah Tinggi KL. Plaintif-plaintif di dalam kedua-dua guaman sivil pada masa matan adalah Celcom Malaysia Bhd ('Celcom') dan Technology Resources Industries Bhd ('TRI'). Celcom adalah subsidiari yang dimiliki sepenuhnya oleh TRI tetapi disebabkan hutang dan menjalankan penyusunan semula korporat pada 10 Oktober 2002, TRI menjadi subsidiari yang dimiliki sepenuhnya oleh Celcom yang mana kemudiannya disenaraikan di KLSE. Perayu-perayu di dalam kedua-dua set rayuan pada masa matan adalah pengarah-pengarah Celcom dan/atau TRI. Sekitar tahun 1996, Deutsche Telekom AG ('DTAG') melalui subsidiari yang dimiliki sepenuhnya Deteasia Holding GmbH ('DTAH') telah memeterai pelbagai perjanjian dengan Celcom dan TRI. Perjanjian-perjanjian ini termasuk antara lain 'veto rights' yang mana memerlukan kedua-dua Celcom dan TRI untuk memperolehi kebenaran DTAH sekiranya mereka ingin mengeluarkan atau memperuntukkan lebih daripada 5% sahamnya kepada syarikat telekomunikasi yang lain atau memperolehi saham dalam atau bergabung dengan syarikat telekomunikasi yang lain; dan 'buy-out provision', yang mana memperuntukkan bahawa dalam ketiadaan kebenaran sedemikian daripada DTAH, Celcom hendaklah mendapatkan pihak ketiga untuk menawarkan untuk membeli sahamnya pada formula yang ditetapkan. Selanjutnya Celcom memeterai perjanjian dengan Telekom Malaysia Bhd untuk memperolehi kesemua modal saham yang dikeluarkan dan berbayar TM Cellular (M) Sdn Bhd tanpa kebenaran DTAH. DTAH memulakan prosiding-prosiding timbang tara terhadap Celcom. Mahkamah Timbang Tara Antarabangsa (ICC) mendapati Celcom bertanggungjawab terhadap DTAH untuk percanggahan hak-hak veto dan peruntukan buy-out dan mengawardkan pampasan kepada DTAH dengan faedah dan kos. Selanjutnya Celcom dan TRI memulakan kedua-dua guaman sivil terhadap award timbang tara akhir ICC, di mana perayu-perayu memohon untuk diketepikan atas dasar bahawa perkara subjek, isu-isu dan fakta-fakta di dalam kedua-dua guaman telah dibangkitkan dan dihujah oleh plaintif pertama di dalam Timbang Tara ICC di antara Celcom dan DTAH. Perayu-perayu berhujah bahawa kebenaran untuk isu luar bidang kuasa tidak seharusnya diberikan di bawah A 11 k 4 Kaedah-Kaedah Mahkamah Tinggi ('KMT') dan berhujah bahawa kedua-dua guaman sivil membentukkan penyalahgunaan proses mahkamah kerana ia merupakan serangan kolateral terhadap award akhir.

Diputuskan, menolak rayuan-rayuan dengan kos dengan jumlah RM50,000:

(1) Perkara subjek dan relief yang dituntut di dalam kedua-dua guaman sivil berbeza daripada timbang tara ICC. Di dalam guaman pertama daripada

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kedua-dua guaman sivil (guaman 610) tuntutan oleh Celcom dan TRI adalah berdasarkan percanggahan yang dilakukan oleh perayu-perayu sebagai pengarah-pengarah Celcom dan TRI. Di dalam guaman 610, Celcom dan TRI memohon untuk mendapatkan semula keuntungan yang dibuat oleh pengarah-pengarah yang berbeza akibat daripada percanggahan kewajipan fidusiari mereka dan kerugian yang dialami oleh Celcom dan TRI akibat percanggahan sedemikian. Berkenaan dengan guaman sivil kedua (guaman 1960), Celcom dan TRI menegaskan bahawa perayu-perayu dengan salah dan melalui cara-cara yang salah di sisi undang-undang bersubahat untuk mencederakan atau menyebabkan kerugian kepada kedua-dua Celcom dan TRI. Oleh itu, akibatnya, award akhir oleh ICC tidak menjelaskan tingkah laku perayu-perayu sebagai pengarah-pengarah Celcom dan TRI, peranan mereka di dalam mana-mana langkah yang membawa kepada pemeteraian perjanjian dengan DTAH atau membuat apa-apa dapatan vis-a-vis perayu-perayu berkenaan isu yang dibangkitkan di dalam kedua-dua guaman (lihat perenggan 18–20, 24 & 27).

(2) Selanjutnya, perayu-perayu bukanlah pihak kepada prosiding-prosiding. Adalah undang-undang tetap bahawa award timbang tara tidak mempunyai kesan kepada seseorang yang bukan pihak dan tidak boleh dijadikan sebagai keterangan bagi fakta yang ditemui bagi tujuan prosiding-prosiding yang selanjutnya. Tambahan, perayu-perayu tidak boleh dianggap sebagai privi kepada timbang tara ICC memandangkan tidak terdapat kepentingan privi di antara syarikat dan pengarah-pengarahnya (lihat perenggan 25–26).

(3) Adalah undang-undang tetap bahawa pemohon yang memohon untuk kebenaran untuk berkhidmat di luar bidang kuasa hanya perlu menunjukkan bahawa terdapat kes yang boleh dipertikaikan yang mana perkara terangkum di dalam salah satu cabang A 11 k 1(1) KMT dan berkenaan dengan merit tuntutan terdapat isu yang serius yang perlu dibicarakan. Dalam kes ini, hakim bicara adalah betul dalam dapatan bahawa tuntutan di dalam guaman 610 terangkum di dalam lingkungan A 11 k 1(h) dan (j) KMT. Berkenaan dengan merit tuntutan, daripada pliding-pliding adalah jelas bahawa kedua-dua prosiding berkaitan dengan tindakan Celcom dan TRI untuk percanggahan kewajipan fidusiari sebagai pengarah-pengarah kedua-dua syarikat. Daripada pliding-pliding dan afidavit-afidavit terdapat isu-isu serius yang harus dibicarakan di dalam kedua-dua guaman yang mana harus dikendalikan di dalam perbicaraan penuh dan yang mana tidak boleh diselesaikan dengan ringkas. Justeru, Celcom dan TRI telah memenuhi keperluan di bawah A 11 k 4 KMT iaitu keperluan prosedur telah dipenuhi dan ia juga telah menunjukkan bahawa kes terhadap perayu-perayu masing-masing di dalam kedua-dua guaman adalah tulen (lihat perenggan 21–22).]

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Notes

For a case on application for, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) para 7909.

Cases referred to

Bell Group Ltd v Westpac Banking Corporation (2008) 70 ACSR 1, SC (refd)
Dadourian Group International and others v Simms and others [2009] 1 Lloyd's Rep 601, Ch D (refd)
Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (1993) 43 FCR 510 (refd)
Kastner v Jason [2005] 1 Lloyd's Rep 397, CA (refd)
Perumahan Farlim (Pg) Sdn Bhd & Ors v Cheng Hang Guan & Ors [1989] 3 MLJ 223, SC (refd)
Purser & Co (Hillingdon) Ltd v Jackson and another [1976] 3 All ER 641, QBD (refd)
Sacor Maritima SA v Repsol Petroleo SA [1998] 1 Lloyd's Rep 518, QBD (refd)
Sesaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1993] 4 All ER 456, HL (refd)
Shears v Chisholm [1994] 2 VR 535, SC (refd)
Sun Life Assurance Company of Canada and others v The Lincoln National Life Insurance Company [2005] 1 Lloyd's Rep 606, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 11, O 11 rr 1, 1(1), 1(1)(h), (1)(j), 4, 4(2), O 12 r 7

Appeal from: Suit No D5–22–610 of 2006 (High Court, Kuala Lumpur)

Christopher Leong (Lim Tuck Sun and Tan Hui Xian with him) (Chooi & Co) in Civil Appeal No W-02(IM)-2069 of 2010 and four related appeals for the appellants.
Christopher Leong (Lim Tuck Sun and Tan Hui Xian with him) (Chooi & Co) in Civil Appeal No W-02(IM)-3132 of 2010 and two related appeals for the appellants.
Rabindra S Nanthan (Nad Segaram with him) (Shearn Delamore & Co) in Civil Appeal No W-02(IM)-2069 of 2010 and four related appeals for the respondents.
Rabindra S Nanthan (Nad Segaram with him) (Shearn Delamore & Co) in Civil Appeal No W-02(IM)-3132 of 2010 and two related appeals for the respondents.

Azahar Mohamed JCA (delivering judgment of the court):

(CELCOM JUDGMENT NO 1)

[1] There are two sets of appeals before us.

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[2] The first are five related appeals, namely Civil Appeals Nos W-02(IM)-2069 of 2010, Nos W-02(IM)-2067 of 2010, W-02(IM)-2068 of 2010, W-02(IM)-2070 of 2010 and W-02(IM)-2082 of 2010. The five appellants in these five appeals are the following defendants in Kuala Lumpur High Court Civil Suit No D5–22–610 of 2006 ('the 610 suit'):

(a) the fourth defendant — Dieter Sieber;

(b) the fifth defendant — Frank Reinhard Bartsch;

(c) the seventh defendant — Joerg Andreas Boy;

(d) the eighth defendant — Axel Hass; and

(e) the nineth defendant — Oliver Tim Axmann.

The plaintiffs in the 610 suit are Celcom (M) Bhd ('the first plaintiff') and Technology Resources Industries Bhd ('the second plaintiff').

[3] The second set of appeals are three related appeals, namely Civil Appeals Nos W-02(IM)-3123 of 2012, W-32(IM)-3121 of 2012 and W-02(IM)-3125 of 20I2. The three appellants in these three appeals are the following defendants in Kuala Lumpur High Court Civil Suit No D1-22–1960 of 2006 ('the 1960 suit'):

(a) the fourth defendant — Axel Hass;

(b) the fifth defendant — Oliver Tim Axmann;

(c) the sixth defendant — DeTeAsia Holding GmbH ('DTAH');

[4] The plaintiffs in the 1960 suit are also Celcom (M) Bhd ('the first plaintiff') and Technology Resources Industries Bhd ('the second plaintiff').

[5] For convenience and ease of reference, we will refer to all the parties in this judgment as in the manner they were referred to in the two suits in the High Court.

[6] All these two sets of appeals arise from the decisions of the learned judges given in the High Court at Kuala Lumpur dismissing the various applications filed by the above mentioned defendants seeking to set aside the issue and service of the notices of writ of summons and statements of claim under O 12 r 7 of the Rules of the High Court 1980 ('RHC') and the inherent jurisdiction of the court.

[7] The background facts have been well set out in the judgment of the learned High Court in respect of the 610 suit. We will only repeat in the

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following paragraphs the relevant facts as narrated by the learned judge in so far as they are relevant to the issues which arise for decision in these appeals.

[8] The first plaintiff was a wholly owned subsidiary of the second plaintiff until 10 October 2002. During that time, the second plaintiff was listed on the Kuala Lumpur Stock Exchange. The first plaintiff is presently a wholly-owned subsidiary of Telekom (M) Bhd. After 10 October 2002 pursuant to a debt and corporate restructuring exercise, the second plaintiff became the wholly owned subsidiary of the first plaintiff and the listing status of the second plaintiff was transferred to the first plaintiff. The fourth, fifth, seventh, eighth, and ninth defendants were directors nominated by Deteasia Holding GmbH ('DTAH') on the board of directors of the first and/or second plaintiffs.

[9] Sometime in 1996, Deutsche Telekom AG ('DTAG') entered into various agreements with the second plaintiff and companies related to it, including the first plaintiff. Pursuant thereto, DTAG subscribed for shares in the second plaintiff, and was accorded the status of 'sole strategic investor'. Amongst these agreements were a subscription agreement dated 25 June 1996 and a management agreement dated 26 September 1996.

[10] On 12 January 2000, DTAG novated its rights under the subscription agreement and management agreement to DTAH, its wholly owned subsidiary which was the holding company for DTAG's investments in Asia. Pursuant to the debt and corporate restructuring exercise referred to earlier, the first plaintiff, the second plaintiff and TRI International Ltd, on 7 February 2002, entered into a supplemental agreement to the subscription and management agreements with the first plaintiff.

[11] Thereafter, on 4 April 2002, the first plaintiff, the second plaintiff and TRI International Ltd entered into an amended and restated supplemental agreement ('ARSA') with DTAH. The supplemental agreement and ARSA form the core of the claim in this suit. The subscription agreement and ARSA both contain what the statement of claim terms 'veto rights'. These 'veto rights' provided that the first plaintiff and the second plaintiff must obtain DTAH's written consent if they intended to issue or allot more than 5% of its shares to another telecommunications company, acquire shares in another telecommunication or otherwise merge with another telecommunications company. The ARSA also had what the statement of claim called a 'buy-out provision', which provided that in the absence of the said written consent from DTAH, the first plaintiff was obliged to obtain a third party to an offer to purchase its shares at a prescribed formula.

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[12] As it turned out, on or about 28 October 2002, the first plaintiff entered into an agreement with Telekom Malaysia Bhd to acquire the whole of the issued and paid-up share capital of TM Cellular (M) Sdn Bhd without DTAH's consent.

[13] DTAH then commenced arbitration proceedings against the first plaintiff in the International Court of Arbitration of the International Chamber of Commerce at Geneva, Switzerland ('the ICC'). The claim in arbitration turned on the veto rights and 'buy-out provision' in the ARSA. The ICC found the first plaintiff liable and awarded damages and costs to DTAH. The first plaintiff had made payments on the award to DTAH in full.

[14] Afterwards both the plaintiffs commenced these present two suits.

[15] Both the suits arise in relation to the arbitration award dated 2 August 2005 handed down on 30 August 2005 in the ICC arbitration proceedings between the first plaintiff and DeteAsia Holding GMBH ('DTAH'). The ICC found the first plaintiff liable to DTAH for breach of the Veto Rights and the buy out provision in cll 4.1, 4.4 and 5.1(c) of the amended and restated agreement dated 4 April 2002 ('the ARSA') between the first plaintiff, the second plaintiff, TR International Limited and DTAH. Consequent to such finding, the arbitral tribunal awarded damages of USD177,243,609 ('the principal sum') with interest and costs.

[16] As we have indicated earlier, the defendants in both the suits have filed applications to have the proceedings set aside under O 12 r 7 of the RHC and the inherent jurisdiction of the court. The grounds of the said applications were that:

(a) the subject matter, issues and the facts in the suits had been raised and argued by the first plaintiff in the ICC Arbitration between the first plaintiff and DTAH;

(b) the ICC arbitration culminated in a final award dated 2 August 2005;

(c) the final award had been registered and enforced as a consent order and judgment of the High Court of England dated 17 February 2006;

(d) the consent order and judgment had been satisfied in full on 2 March 2006 in the sum of USD232,999,745.80 and costs; and

(e) the final award was also registered as a final judgment of the High Court of Singapore.

[17] Before us, learned counsel for the defendants argued that no leave to issue out of jurisdiction should have been granted under O 11 r 4 of the RHC

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on the grounds that the subject matter of the suit is caught by issue estoppel and res judicata; and even if issue estoppel does not arise, the present suit constitute an abuse of the process of court as they are collateral attacks on the final award.

[18] We have read and reviewed in detail the appeal records and the judgments of the learned High Court judge. We have also considered the lengthy oral and written submissions of both the parties. In our view, there is much force in the arguments of the first and second plaintiffs that the subject matter and relief claimed in the present suits was different from that of the ICC arbitration. In our judgment, based on the factual matrix of the present case, the learned High Court judge made correct findings of law that issue estoppel and res judicata had no application to the circumstances of the case. Our reasons for so deciding are as follows.

[19] For the proper determination of this issue, it must be borne in mind that in respect of the 610 suit, the plaintiffs' claim is based on the following causes of action. First, breach by the fourth, fifth, seventh, eighth, and ninth defendants of their fiduciary duties to the first and second plaintiffs as a result of the entry into the supplemental agreement and ARSA and the conferral on DTAH the veto rights and buy out provisions. In this suit, both the plaintiffs are seeking to recover profits made by the various directors as a result of such breaches and (ii) the losses suffered as a result of such breaches including the payments that had to be made to DTAH pursuant to the entry into the ARSA and the subsequent exercise of the veto rights.

[20] Furthermore, it is important to note that in relation to the 1960 suit, the plaintiffs averred that fourth, fifth and sixth defendants wrongfully and by unlawfully means conspired with each other to injure both the plaintiffs and/or to cause loss to the plaintiffs by causing and/or committing them to enter into the 2002 supplemental agreement and the ARSA and thereby conferring on DTAH the buy-out provision in consideration for the renunciation by DTAH of certain rights shares in favour of Tan Sri Dato' Tajudin bin Ramli. It is also averred that fourth, fifth and sixth defendants unlawfully conspired with each other to injure and/or cause loss to the plaintiffs with the sole and/or predominant purpose of injuring the plaintiffs by subjecting it to the buy-out provision for which there was absolutely no commercial benefit or justification whatsoever.

[21] The House of Lord in *Sesaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 4 All ER 456 at 467 has laid down the general principle that an applicant for leave to serve out of jurisdiction need only show that that there is an arguable case that the matter falls within one of the limbs of O 11 r 1(1) of the RHC and that in respect of the merits of the claim there is a serious issue

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to be tried. In this regard, we agree with the learned judge in the 610 suit that plaintiffs' claim could have fallen within the ambit of O 11 r 1 of the RHC 1980 (h) and (j), which provides as follows:

> (h) If the action begun by the writ is founded on a tort committed within the jurisdiction;
>
> (j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto.

[22] In respect of the merits of the claim, from the pleadings, it is clear that both the proceedings relate to actions by the plaintiffs for breaches of fiduciary as directors arising from the entry of the plaintiffs into the subscription agreement and ARSA. In this regard, the fourth, fifth, seventh, eighth, and nineth defendants as directors had a clear duty in law to protect the plaintiffs companies on which they serve as directors from agreements entered into on unfavourable terms and to protect the plaintiffs from divided loyalties (see *Bell Group Ltd v Westpac Banking Corporation* (2008) 70 ACSR 1). The plaintiffs' claim is also based on torts of conspiracy. It must be emphasised that the defendants have not alleged that the elements of breach of fiduciary duty and tort of conspiracy have not been properly pleaded. From the pleadings and the affidavits, in our view, there are serious issues to be tried in both the suits which ought to be dealt with in a full trial and which cannot be summarily dealt with. Hence in our view, the plaintiffs have satisfied the requirements under O 11 r 4 of the RHC in that the procedural requirements have been satisfied and that the plaintiffs have shown that the case against the respective defendants in both the suits is a genuine one.

[23] This brings us to the argument of learned counsel of the respective defendants to the effect that there are no grounds to justify service out of jurisdiction and leave should have been refused under O 11 r 4(2) of the RHC as the issues which are the subject matter of both the suits had already been decided on in the arbitration; hence the doctrine of res judicata and issue estoppel apply and the plaintiffs are precluded from relitigating these issues, and that such an attempt to relitigate the issues decided in the arbitration amounts to an impermissible collateral attack on the award.

[24] We do not agree with these submissions. On the other hand, we agree with the submissions of the learned counsel for the plaintiffs that the ICC award did not address the conduct of the respective defendants or their roles in any of the steps leading to the supplemental agreement and the ARSA, nor did it make any findings vis a vis the defendants on the issues that are raised in both the suits.

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[25] Even more, it must be borne in mind that the defendants in both the suits were not parties to the ICC proceedings. It is trite law that an arbitration award has no effect on persons who were not parties to the same and cannot be relied on as evidence of the facts found for the purposes of subsequent proceedings (see *Sacor Maritima SA v Repsol Petroleo SA* [1998] 1 Lloyd's Rep 518, *Kastner v Jason* [2005] 1 Lloyd's Rep 397, (*Russell on Arbitration* (21st Ed) 1997 para 6-210, *Law Practice and Procedure of Arbitration* by Sundra Rajoo p 488). An arbitration award between A and B does not bind C, a stranger to the arbitration proceedings (see *Sun Life Assurance Company of Canada and others v The Lincoln National Life Insurance Company* [2005] 1 Lloyd's Rep 606 and *Dadourian Group International and others v Simms and others* [2009] 1 Lloyd's Rep 601).

[26] This leads us to the privy exception rule, which states at a person who was not a party to an arbtration might be bound by the award if the person was 'privy' to the arbitration by virtue of the person's interest in it (see *Perumahan Farlim (Pg) Sdn Bhd & Ors v Cheng Hang Guan & Ors* [1989] 3 MLJ 223). In our view, except for the 6th defendant in the 1960 suit, it has not been established how the rest of the relevant defendants in both the suits are considered privies to the ICC arbitration. There is no privity of interest between a company and its directors (see *Shears v Chisholm* [1994] 2 VR 535 and *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd* (1993) 43 FCR 510).

[27] It is true that the sixth defendant is a party to the arbitration. However, as correctly held by the learned High Court judge in the award the arbitrators did not make any determination as to whether there was conspiracy on the part of the sixth defendant. As held in the case of *Purser & Co (Hillingdon) Ltd v Jackson and another* [1976] 3 All ER 641, where an issue was not included in the terms of reference, even though a dispute between the parties about it existed at the time of the arbitration, the claimant would not be stopped from raising the issue subsequently. The ICC was not asked to and did not determine whether or not there have on the facts such a conspiracy between the various parties. In actual fact, the cause of action in the ICC arbitration and both the present suits are different.

[28] For all the reasons stated, we unanimously dismissed all these appeals with costs in the sum RM50,000 in favour of the respondents. Further we order the deposits to be paid to the respondents to account of costs.

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Appeals dismissed with costs in the sum of RM50,000.

Reported by Kohila Nesan